FILED
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959.

No. 585

RALPH RICHARDSON, Petitioner,

versus

C. C. BRUNNER, Respondent.

RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

THOMAS ELLIS LODGE

C. C. BELL,
601 Center Building,
Louisville, Kentucky,

JOSIAH B. GATHRIGHT,
Kentucky Home Life Building,
Louisville, Kentucky,
Attorneys for Respondent.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX, POINTS AND AUTHORITIES.

	PAGE
Historical Statement	1- 5
KRS 91.510	3.
Chapter 91 of Kentucky Revised Statutes	6
Section 181 of the Constitution	6
Constitutionality Not Questioned	7
Jurisdiction	8-12
Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476	11
Thompson v. Consolidated Utilities Corp., 300 U. S. 55, 81 L. Ed. 510	11
People of State of New York Ex rel. Cohn v. Graves, 300 U. S. 308, 81 L. Ed. 666	11
Ireland v. Woods, 246 U. S. 323, 62 L. Ed. 745	11
Live Oak Water Users Assn. v. Railroad Commissioner, 269 U. S. 354, 70 L. Ed. 305	11
Nashville C. and St. L. R. Co. v. Taylor (CC Tenn.), 86 Fed. 168	11
Empire State-Idaho Min. & Dev. Co. v. Hanley, 198 U. S. 292, 49 L. Ed. 1056	11
Willoughby v. Chicago, 235 U. S. 45, 59 L. Ed. 123	11
Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. Ed. 127	11
Hiawassee River Power Co. v. Carolina Tennessee Power Co., 252 U. S. 341, 64 L. Ed. 601	11
Missouri Pac. R. Co. v. Hannah, 266 U. S. 184, 69 L. Ed. 235	11
New York ex rel. Rosevale Realty Co. v. Kleinert, 268 U. S. 646, 69 L. Ed. 1135	11
Mellon v. O'Neil, 275 U. S. 212, 72 L. Ed. 245	11
White River Lumber Co. v. Arkansas ex rel. Applegate, 279 U. S. 692, 73 L. Ed. 903	11

PAGE

Van Huffel v. Harkleroad, 284 U. S. 225, 76 L. Ed. 256 12

Aero Mayflower Transit Co. v. Georgia PS-Commi, 295 U. S. 285, 79 L. Ed. 1439 12

Henderson v. Georgia, 295 U. S. 441, 79 L. Ed. 1530 12

Pennsylvania R. Co. v. Illinois Brick Co., 297 U. S. 447, 80 L. Ed. 796 12

Jackson v. State, 280 S. W. 202, 103 Texas 318 12

For the Reasons Stated Respondent Insists 12

Bowe v. Scott, 233 U. S. 658, 58 L. Ed. 1141 12

Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162, 62 L. Ed. 221 12

The Statute Under Which This Question Is Based Is Valid and Supported by Sections 2 and 109 of the State Constitution 13

Respondent's Answer To 13

Citations Recited on Page 2 of Brief 13

Petitioner Under Statement of Material Facts, Pages 5 to 14 Inclusive 14

Life History of Petitioner Does Not Present a Federal Question 14-15

Richardson v. Brunner, 327 S. W. 2d 572 15

Des Moines v. Des Moines City R. Co., 214 U. S. 179, 317 U. S. 678-87 L. Ed. 544 15

Questions Before the Court 16

KRS Section 91.280 16

KRS Section 91.340 17

KRS Section 91.360 17

KRS Section 91.140 17

KRS Section 91.420 17

KRS Section 91.450 18

PAGE

KRS Section 91.460 18
KRS Section 91.480 18

So Plain That a Child Can Understand 18–20

Adams Express Company v. Young, 184 Ky. 49, 211 S. W. 407 19

Additional Points and Authorities 21–29

Roscoe R. Dalton, Taxpayer v. State Property and Building Commission, et al. 21
KRS 91.480, Clause 3 23
A. R. Sheffield v. The State of Texas, 307 S. W. 2d p. 100 23
Bedinger v. Graybill's Executor and Trustee, 302 S. W. 2d 594 24
KRS 91.010 et seq. 25
KRS 91.480 27

Important Decisions 30–33

Drane v. Graves, 261 Ky. 787, 88 S. W. 2d 927 30
KRS 91.470 30–33
KRS 91.480 30–33
KRS 91.490 30–33
KRS 91.500 30–33
KRS 91.510 30–33
KRS 91.520 30–33
KRS 91.530 30–33
KRS 91.540 30–33

Federal Questions Sought To Be Reviewed 34

KRS 91.010 et seq. 34

K.R.S. 411.120—Action to Quiet Title 34

Rowe v. Scott, 233 U. S. 658, 58 L. Ed. 1141 34

Constitutional Provisions Not Involved 35

In Conclusion 35

IN THE

Supreme Court of the United States

October Term, 1959.

No. 585

RALPH RICHARDSON, - - - - - *Petitioner,*

v.

C. C. BRUNNER, - - - - - - *Respondent.*

RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

HISTORICAL STATEMENT.

The petitioner, through his counsel tries to favorably impress this Honorable Court, by placing a great deal of stress upon the ignorance, poverty and misguidance of the defendant, Ralph Richardson, as grounds for obtaining the Writ prayed herein. They also charge that counsel for C. C. Brunner made misleading statements to the petitioner, but upon examination of the record in the case we find that the petitioner was not ignorant, poverty stricken or misguided, but a selfish imposing individual, who thought only of himself, and his wilful delay and negligence has been the sole cause of his difficulties and the loss of his property through tax sales to secure the payment of taxes and penalties.

This petitioner may be void of book knowledge, but he certainly knew enough to collect his rents and spend the money and permit others to pay his taxes. He knew that he owned real property from which he collected monthly rentals and that he owed City taxes as well as State and County taxes, yet he permitted his tax bills to accumulate and to become delinquent for the year 1950, at which times his property was duly advertised for sale pursuant to law in the daily papers and posted *in the City Hall* as required by Statute.

He failed to appear and pay his tax in due time and at the time and place designated in the notice of sale a tax bill for the year 1950, his tax bill against the property herein, was sold to the respondent C. C. Brunner.

He received additional tax bills for the year 1951 and 1952 but he still failed to pay his tax or redeem his property but collected his rents and permitted this respondent to pay his taxes for the additional two years, during which period he had the privilege of paying the delinquent tax with interest and penalties, but still he elected to let this respondent pay the tax while he collected the rent and spent it for his own use and benefit.

For further evidence of the insincerity of petitioner's claim that he was prevented from paying his tax, and redeeming his property by the exorbitant price and strict demands of this respondent's counsel, and that he attempted to pay his taxes before expiration of redemption period, and that he was denied due process of law, falls flat because he would not have had to come

to respondent if he had sought in good faith to redeem his property within the time allowed by law, for that is done in the office of the Tax Receiver and the purchaser has no choice in the matter, but to receive his refund plus interest and penalties.

KRS 91.510. Redemption of Real Property Sold at Tax Sale.

"(1) The owner of any real property sold for city taxes, or his heirs, or representatives, shall have the same right to redeem such property from the purchaser thereof as is provided by law in the case of real property sold under execution, by paying to the tax Receiver the amount of the purchase price at the sale, with interest thereon at the rate of 1% per month, or fraction thereof, from the date of sale, and in case the land is not redeemed before April 1 next succeeding the sale, by paying a further penalty of 5% upon the purchase price. In the case of an adult owner the redemption must be made within two years from the date of sale, and in the case of an infant owner it must be made within one year after he becomes of age. . . . .

"(2) All money paid in redemption of real property sold for city taxes shall be paid to the *Tax Receiver who shall account for the money in the same manner and to the same officer as in the case of regular tax collections. . . . The tax Receiver shall pay over to the purchaser upon proper receipt, the amount of the purchase price with interest and penalties thereon.*" (Emphasis supplied.)

This the taxpayer, Ralph Richardson, the petitioner herein, neglected to do; thus the Court can readily see from the law herein, that the petitioner is not sincere when he claims that he was prevented by the exorbitant demands of counsel for respondent, from redeeming his property within the time allowed by law, thereby denying him due process thereof.

The petitioner not only failed to redeem his property before the expiration date for redemption, but failed to make any effort to effect a settlement for more than three years after the expiration date and would no doubt be delinquent to this day if action had not been taken.

After suit was filed and defendant having been duly served and process returned by the Sheriff and 20 days having expired as required by the rule CR 12.01, counsel for plaintiff filed several pleadings in the case and mailed copies to the defendant with full postage affixed thereto and none were returned, but still no defense was made by the defendant or any settlement attempted although suit was filed and service made. Finally after several days of delay counsel for plaintiff, C. C. Brunner filed motion for judgment and mailed copy postage paid, to defendant and upon the failure of defendant to answer, judgment was rendered in favor of plaintiff, C. C. Brunner on October 22, 1956. See petitioner's petition, Appendix V.

This petitioner had plenty of time to redeem his property if he had not slept upon his rights to redeem before Judgment, pursuant to Kentucky C.R. 12.01

which provides that defendant shall answer summons within 20 days.

This action v. petitioner, Ralph Richardson, was filed in the Jefferson Circuit Court on the 20th day of April 1956, almost four years after date of deed, December 8, 1952 which was executed and delivered to respondent, for copy of Complaint of Respondent. See petitioner's petition, Appendix IV, pages 47, 48 and 49.

Although suit was filed and service had on defendant, Ralph Richardson, he did not answer or make settlement before judgment was entered on October 22, 1956. Petitioner's petition, Appendix V, pages 50-51.

Petitioner states in his petition, page 11, second paragraph, clause (2) "That petitioner tried to redeem his property within the time allowed by law and before his property was conveyed by City Tax Deed". This effort certainly was not in good faith, if it had been petitioner would have been able to redeem the same and Brunner, the respondent, would not have had any choice in the matter, and the Tax Receiver would not have executed the deed to C. C. Brunner.

The first active step taken by petitioner, the defendant in the Court below, was by motion on November 23, 1956 to set aside the judgment entered 32 days before. This judgment is a regular valid judgment, entered properly under the law and is not void "*ab initio*" as contended by the petitioner. The only question here is, whether or not the judgment is authorized by statutory provisions.

CHAPTER 91 OF KENTUCKY REVISED STATUTES.

Pursuant to the powers vested in it by Section 29 of the Constitution of the Commonwealth of Kentucky, the Legislature has enacted into law Chapter 91 of the Kentucky Revised Statutes, which is entitled:

FINANCE AND REVENUE OF CITIES OF THE FIRST CLASS.

SECTION 181 OF THE CONSTITUTION.

Louisville is a City of the First Class and is subject to and is governed by these Statutes, duly enacted by the General Assembly of the Commonwealth of Kentucky, all of which laws are now and have always been in full force and effect since the enactment of Chapter 91 of the Kentucky Revised Statutes as provided in Section 181 of the Constitution of Kentucky.

The validity of these Statutes has never been questioned, so it must now be admitted that it is the *Law of Finance and Revenue* for Cities of the First Class. Louisville being a City of the First Class, it is the law now in force therein.

The people through their duly elected Representatives have spoken and KRS Sections 91.010 to 91.990 is the *Law* providing for the *Finance and Revenue of Cities of the First Class* and will remain the Law until *Repealed, Amended* or *declared* to be in *conflict* with the *Constitution of the State of Kentucky* or of the *Constitution of the United States.*

CONSTITUTIONALITY NOT QUESTIONED.

The constitutionality of this law has never been attacked by the taxpayer, and now stands within the Statutes *INVIOLATE*. For those who wish to attack the validity of this or any other Act of the Legislature, we call the Court's attention to the case of Johnson, Governor, Commonwealth ex rel, Meredith, Attorney General, in which the Court said:

> "Be that as it may, it is a principal, basic in its recognition and fundamental to the co-ordination of the two divisions of governmental power, that the courts do not concern themselves with the wisdom, need or appropriateness of legislation, nor the purposes motivating it. That is left where it is put by the constitution—in the General Assembly, subject only to the veto power of the Governor. Section 26 of the Constitution declares that all laws 'Contrary to this Constitution shall be void.' Our functions are to determine the constitutional validity and to declare the meaning of what the legislative department have done. We have no other concern.
>
> "And we have been sensitive to the rule that an Act should be held valid unless it clearly offends the limitations and prohibitions of the constitution, within which is everything contrary to the policies and genius of our form of government. So, always a burden is upon one who questions the validity of an act to sustain his contention." Johnson, Governor, Commonwealth, ex rel. Meredith, Attorney General, 291 Ky. 829, 165 S. W. 2d 820.

JURISDICTION.

There is certainly no question about the jurisdiction of the trial Court below over the subject matter and the parties involved. The defendant was duly served to answer a properly prepared complaint as required by Rule C.R. 12.01 of the Civil Rules of Procedures, and upon his failure to answer and make defense, judgment was properly entered in accordance to the pleadings filed in this action.

This judgment has been repeatedly upheld by the Court of Appeals of the Commonwealth of Kentucky, and held to be clearly within the *jurisdiction* and *Discretion* of the *trial Court*, and not void *"ab initio"* as contended by petitioner.

Respondent insists that no constitutional questions have been raised in this Court and especially in the Court below. There has never at any time been any question raised in the trial Court before judgment as to the constitutionality of the Statute under which this action was instituted. Petitioner's claim is based entirely upon one section of the same statute upon which respondent relies, yet the constitutionality of that section has not been questioned in the state Court and respondent insists that, petitioner, the defendant in the trial Court, wilfully slept upon his rights after due and timely notice permitting a default judgment to be entered against him.

Section 2, of the constitution of Kentucky has no bearing upon this cause, no Court or any individual

has exercised or attempted to exercise absolute or arbitrary power over petitioner or his property. He was given every possible opportunity to come into Court and assert his rights if any he had and he failed and neglected to do so.

Section 109 of the Constitution of Kentucky has no significance because the one supreme court (to be styled the Court of Appeals) has heard and ruled upon this cause 3 times and has rendered the same opinion each time. The entire record from beginning to end shows conclusively that the defendant in the trial Court had every opportunity that could possibly be given to him to answer the complaint and that he was not, under any circumstances, deprived of life, liberty or property without due process of law, as claimed in controvention of the 5th and 14th amendments of the Constitution of the United States.

"Before Supreme Court may review decisions of State Court it must appear affirmatively from the record not only that Federal question was presented to the highest Court of the State having jurisdiction but that its decision of the Federal question was necessary for determination of the case." Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476.

"United States Supreme Court will not decide an issue of constitutionality of state statutes if case may reasonably be decided upon construction of statute under which act is clearly constitutional." Thompson v. Consolidated Gas Utilities Corporation, 300 U. S. 55, 81 L. Ed. 510.

"Supreme Court would not pass on constitutional question not shown by record to have been raised in state court, whether or not it arose under a different or the same constitutional clause with respect to which other questions were properly presented." People of State of New York, ex rel. Cohn v. Graves, 300 U. S. 308, 81 L. Ed. 666.

"An objection not taken at the trial and therefore not open in the state supreme Court cannot be considered in the United States Supreme Court." Willoughby v. Chicago, 235 U. S. 45, 59 L. Ed. 123.

"The Federal right must have been set up and adjudicated against the claimant by the judgment of the State Court." Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. Ed. 127.

"Writ of Certiorari will be dismissed where record fails to disclose that complaining party definitely raised Federal question in State Court." Missouri Pac. R. R. Co. v. Hanna, 266 U. S. 184, 69 L. Ed. 235.

"Question not presented to or passed upon by State Court cannot form basis for Writ of Error." Mellon v. O'Neil, 275 U. S. 212, 72 L. Ed. 245.

"A constitutional question not shown by the record to have been presented to and determined by the State Court will not be considered." White River Lbr. Co. v. Arkansas ex rel. Applegate, 279 U. S. 692, 75 L. Ed. 903.

KRS 91.480 and 91.540 are valid statutes of the Commonwealth of Kentucky and have never been questioned or attacked by this petitioner or any one else as to their constitutionality and for this and other valid reasons, respondent contends that this Court has no

jurisdiction over the subject matter as presented in this action; Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476. Thompson v. Consolidated Utilities Corp., 300 U. S. 55, 81 L. Ed. 510. People of State of New York Ex rel. Cohn v. Graves, 300 U. S. 308, 81 L. Ed. 666, Ireland v. Woods, 246 U. S. 323, 62 L. Ed. 745, Live Oak Water Users Assn. v. Railroad Commissioner, 269 U. S. 354, 70 L. Ed. 305.

When the jurisdiction is founded upon the subject matter alone, the case must be one arising under the Federal Constitution or laws involving a Federal question. Nashville C. and St. L. R. Co. v. Taylor (CC Tenn.), 86 Fed. 168.

Necessity of raising Federal question in State Court. Empire State-Idaho Min. & Dev. Co. v. Hanley, 198 U. S. 292, 49 L. Ed. 1056, Willoughby v. Chicago, 235 U. S. 45, 59 L. Ed. 123, Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. Ed. 127, Hiawassee River Power Co. v. Carolina Tennessee Power Co., 252 U. S. 341, 64 L. Ed. 601, Missouri Pac. R. Co. v. Hannah, 266 U. S. 184, 69 L. Ed. 235.

Supreme Court has no jurisdiction where alleged unconstitutionality was not raised below, New York ex rel. Rosevale Realty Co. v. Kleinert, 268 U. S. 646, 69 L. Ed. 1135, Mellon v. O'Neil, 275 U. S. 212, 72 L. Ed. 245. White River Lumber Co. v. Arkansas, ex rel. Applegate, 279 U. S. 692, 73 L. Ed. 903.

Petitioner has not raised any constitutional question, he merely contends that the judgment of the trial Court is void *"ab initio"* because he alone considers the statute invalid, not having attacked the constitution-

ality of statute in the Court and no opinion on the question having been rendered on that point he has no authority to assume that the statute is invalid. Van Huffel v. Harkleroad, 284 U. S. 225, 76 L. Ed. 256. Aero Mayflower Transit Co. v. Georgia PS-Commn, 295 U. S. 285, 79 L. Ed. 1439. Henderson v. Georgia, 295 U. S. 441, 79 L. Ed. 1530. Pennsylvania R. Co. v. Illinois Brick Co., 297 U. S. 447, 80 L. Ed. 796, Jackson v. State, 280 S. W. 202, 103 Texas 318.

FOR THE REASONS STATED RESPONDENT INSISTS

No Federal question has been raised in this action by petitioner. All his objections have been mere assertions of a Federal right which is no grounds for invoking the jurisdiction of the Supreme Court. Bowe v. Scott, 233 U. S. 658, 58 L. Ed. 1141, Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162, 62 L. Ed. 221.

There is no violation of Sections 2 and 109 of the Constitution of Kentucky in the prosecution of this cause. Every step taken and every order, judgment and opinion entered therein has been in regular order and authorized by rules of statute.

THE STATUTE UNDER WHICH THIS QUESTION IS BASED IS VALID AND SUPPORTED BY SECTIONS 2 AND 109 OF THE STATE CONSTITUTION.

Johnson v. Fordson Coal Co., 213 Ky. 445, 281 S. W. 472. L. & N. R. R. Co. v. Greenbrier Distilling Co., 107 Ky. 775, 187 S. W. 296. L. & N. v. Siler, 186 F. 176. L. & N. R .R. Co. v. Garrett, 231 U. S. 298.

RESPONDENT'S ANSWER TO

Petitioner's prayer for writ of certiorari in the order of his prayer and brief filed herein;

1. Petitioner's prayer on page 1 of his petition is insufficient because it fails to state the nature of the four (4) final orders overruling motions to set aside judgment and the two (2) opinions and or decisions of the Court of Appeals, which affirmed the judgment of the lower Court each time.

CITATIONS RECITED ON PAGE 2 OF BRIEF.

1. The citation of the opinions of the Court of Appeals rendered in this case are correct and respondent relies thereon for his defense to petitioner's motion and refers to Appendix I and II of petitioner's brief as a part of his answer.

2. Further as to jurisdiction of this Court respondent refers the Court to his previous comment on jurisdiction recited on page 8 of this response hereto and the citation of authorities therein.

PETITIONER UNDER STATEMENT OF MATERIAL FACTS, PAGES 5 TO 14, INCLUSIVE.

Petitioner just assumes the Tax Receiver failed to comply with the statutory provisions in the sale of the property at the Tax Sale. No proof was taken in this action and the tax deed is prima facie evidence that the law was fully complied with KRS 91.540—"The deed shall be prima facie evidence on the regularity of the sale, of all prior proceedings and of title in the purchaser to whom the deed is executed."

LIFE HISTORY OF PETITIONER DOES NOT PRESENT A FEDERAL QUESTION.

1. The recitation of the biography of petitioner as related by his counsel, is not germane to the subject and has no bearing on the validity of the judgment rendered in the lower Court or the opinion of the Court of Appeals of Kentucky. None of the objections relied upon by the petitioner for his defense in the Court of Appeals or in this Honorable Court were in the record of trial Court before judgment.

Petitioner's life History, his place of birth, conversations with plaintiff's attorney, affidavit of petitioner's counsel as shown on pages 5 to 14 inclusive of petitioner's petition fail utterly to establish any Federal question or that petitioner has been denied due process of the law.

2. This Court has the record before it and the Statute under which this action was prosecuted and can

readily see that the pleadings throughout, corresponds to the rules and the Statute, and in keeping with the opinion of the Court of Appeals of Kentucky in all the cases of Richardson v. Brunner, 327 S. W. 2d 572, and Richardson v. Brunner, 328 S. W. 2d 530. The subject matter and not the parties is the test of the jurisdiction of the Court. 54 Am. Jur., Sec. 21, page 679.

3. A Federal question does not exist where the only act of the defendant complained of is the institution of an orderly proceeding in the Court or by reason of the fact that the case involves the enforcement of the full faith and credit clause, since the cause establishes a rule of evidence rather than of jurisdiction. Cases arising under the law of the United States are such as grow out of the legislation, whether they constitute the right, privilege, claim, protection or defense of the party in whole or in part by whom they are asserted. 54 Am. Jur. 45, page 701—also see Des Moines v. Des Moines City R. Co., 214 U. S. 179, 317 U. S. 678-87 L. Ed. 544, rehearing denied 317 U. S. 710, 87 L. Ed. 566. Respondent calls the Court's attention to Sec. 50, Am. Jur. page 705 and notes 7-8-9, Quote: Sec. 51, Am. Jur. page 706—Notes; Sec. 52 Am. Jur. page 707 Notes and especially Sec. 53, Am. Jur. 54 pages 707-8 and notes thereto.

See about Bond 54 Am. Jur., Sec. 210, page 843, Rule 36.

Briefs etc. 54 Am. Jur., Sec. 211, page 843.

Question not raised in trial Court. 54 Am. Jur., Secs. 216-217.

QUESTIONS BEFORE THE COURT.

The validity of this Statute that governs this petition is not before the Court and was not before the trial Court below and for that reason the trial Court was justified in the rendition of the judgment entered in this case.

Chapter 91 of the Kentucky Revised Statutes in many of its numerous sections provide means of control over the finance and revenue department of Louisville, a City of the First Class, all of which sections are still a valid part of the Statutes under which the City levies and collects its taxes or revenue to finance the various departments of the City Government.

The Legislative Department when enacting this Statute, knowing the frailties of the human mind in construing the law, very definitely instilled into these Statutes various savings clauses so that no one, even the wayfarer, should error therein.

KRS SECTION 91.280 PROVIDING FOR GENERAL AND SPECIAL TAX LEVIES THE LEGISLATURE IN SUBSECTION 3 THEREOF ENACTED THIS SAVINGS CLAUSE:

"If in any year the Board of Aldermen fail to pass a levy ordinance or ordinances, or if the levy ordinance or ordinances is or are invalid or inoperative, the rate of taxation for that fiscal year shall be the same as for the year before, item for item."

KRS 91.340. Assessor to View Property Before Assessing It:

"Failure to comply with this section shall not invalidate the assessment."

KRS Section 91.360 Referring to Designation of Real Property: Errors and Omissions the Legislature in Sub-section 4 of Said Statutes Enacted This Savings Clause:

"No mistake in, or omission of, the correct name of owner or holder of taxable land or improvements shall impair the assessment, if the lands or improvements are designated in the assessment books by the number and block assigned to them or the assessor's map, or otherwise fully identified in the assessment book."

KRS 91.140 Effect of Failure to Elect Board to Act; Taxpayers' Complaint and Remedy:

"If in any year a Board of Equalization is not legally elected, or fails to meet, or fails to perform any essential act, or if, in any year, the assessment books do not remain open for the requisite time, the tax bills shall not thereby become void."

KRS 91.420 Tax Bills, How Made Out and Listed for Collection; Evidence of Validity of Tax:

"Any tax bill so listed with the tax receiver shall be prima facie proof that all steps have been taken to make it a binding tax bill for the amount and purposes and against the person and property therein named or described."

KRS 91.450 TAX NOTICE:

"The failure of the Tax Receiver to send tax notice, or the taxpayer to receive it, shall not invalidate the tax, or the interest or penalties provided for by KRS 91.430."

KRS 91.460 REPORT OF UNPAID TAX BILLS:

"A false report or failure to report shall not invalidate subsequent proceeding for collection of the tax."

KRS 91.480 SALE OF REAL PROPERTY FOR TAXES. SUB-SECTION 3 OF THIS SECTION PROVIDES:

"The failure of the Tax Receiver to send or the taxpayer to receive the notice of sale required by Sub-Section 2 of this Section shall not invalidate the sale or any subsequent proceedings thereunder, and no levy or attempted levy upon personal property shall be necessary to validate any sale of real property, whether for taxes on real property, personal property or both."

SO PLAIN THAT A CHILD CAN UNDERSTAND.

The foregoing savings clauses enacted by the Legislature in the various Sections of this Statute are so positive and plainly worded that even a child could understand and determine the intent of the Legislature when enacting Chapter 91 of Kentucky Revised Statutes containing the law governing the City of Louisville, a City of the First Class. The Legislature certainly intended when it enacted KRS 91.480 that the sale of real property for taxes should not be invalidated because of the failure to make a levy or at-

tempted levy upon personal property before making the sale.

As heretofore stated, we insist that only the Legislative Department has authority to make, repeal, alter or in any manner change the laws of this Commonwealth. This Honorable Court has no constitutional power or authority to add to or take from a law when enacted by the legislative body of this Commonwealth or of the Congress of the United States.

In the case of *Adams Express Company* v. *Young*, 184 Ky. 49, 211 S. W. 407, where it is sought to incriminate the Adams Express Company along with other questions involved in the Local Option laws, it appears that the trial Court exceeded its authority in the application of the law which hinged upon the fact that the Legislature in enacting the Statutes under which the case was being prosecuted had included minors in the new act and did not include inebriates, and in discussing this question the Court said:

> "Why the legislature included minors in the new act and did not include inebriates is not for us to say. It is the duty of the Court to interpret, not make, laws. The power to legislate is delegated to the legislative department. Const. Sections 27 and 28."

In further discussing the validity of the enactment of this Chapter and the various Sections thereof, we desire at this time to call the Court's attention to KRS 91.480, which provides for the sale of real estate when no personal property is reasonably available, and

among other things it provides that the property be sold at public auction. This provision is in Sub-Section 1 of the Statute; but the Legislature in its discretion also provides a savings clause in Sub-Section 3 thereof which specifically and particularly takes care of all the general requirements in KRS Section 91.450, 91.470 and 91.480, Sub-Sections 1 and 2 in the following language, to-wit:

> "THE FAILURE OF THE TAX RECEIVER TO SEND OR OF THE TAXPAYER TO RECEIVE THE NOTICE OF SALE REQUIRED BY SUB-SECTION (2) OF THIS SECTION SHALL NOT INVALIDATE THE SALE OR ANY SUBSEQUENT PROCEEDINGS THEREUNDER, AND NO LEVY OR ATTEMPTED LEVY UPON PERSONAL PROPERTY SHALL BE NECESSARY TO VALIDATE ANY SALE OF REAL PROPERTY, WHETHER FOR TAXES ON REAL PROPERTY, PERSONAL PROPERTY OR BOTH."

One of our Chancery Judges, when sitting as Judge in another case involving the validity of this Section of the Statute, held as follows, after reading and pondering over the wording of the Statute and the statements contained in Sub-Section 3 thereof, said:

"I believe the Statute means just what it says."

ADDITIONAL POINTS AND AUTHORITIES.

The Court of Appeals of Kentucky in the further discussion of Constitutional questions involved in tax legislation has ably said in the case of *Roscoe R. Dalton, Taxpayer* v. *State Property and Building Commission, et al.*, as follows:

> "At the threshold we deem it appropriate to make some preliminary observations. A challenge of the sufficiency of a law under constitutional provisions is not a technical objection to be treated lightly by the Courts. Indeed, it is the sworn duty of the court to enforce provisions of the Constitution irrespective of the consequence. But one of the most firmly established principles of constitutional law, and an oft-repeated mandate of the courts, is that the wisdom of expediency of enactments of the legislature is not for the courts to pass upon. This may be said to have special pertinency in matters of fiscal policies and authority to levy taxes and to appropriate the revenue. Nor are we concerned with the question of whether this project is based upon sound or unsound economic theories or is the best means to achieve the desired results. This is not within the scope of judicial inquiry. So the wisdom of imposing the debt of some hundred million dollars and freezing all or as much as may be required of the highway taxes and revenue for the next thirty years is of no concern whatever to the court. All this was within the legislative responsibility and its power provided it was not restricted by the Constitution. Dalton v. State Property and Building Commission, 304 S. W. 2d 342."

This Court has further held in the case *supra*:

> "In the consideration of the formidable and vital question concerning the meaning and comprehension of 'annual tax' as used in Section 50 of the Constitution in relation to the case at bar, we, of course, recognize the underlying principle that there is a presumption of constitutional validity of a legislative act and the universal rule that a liberal construction is given the constitutional limitations, reasonable doubts being resolved in favor of validity. This judicial position of saving legislation if possible is rooted in the doctrine that a state constitution is not a grant of power but is a limitation on the power of the Legislature and that that department of government possesses and may exercise within constitutional limits all legislative powers as it sees fit. It may enact any law not expressly or impliedly prohibited by the Constitution of the state or the nation."

Further in the same case, we find that the Court further said:

> *"The natural and appropriate office of a proviso is to modify the operation of that part of the statute immediately preceding the proviso, or to restrain or qualify the generality of the language that it follows. Indeed, the presumption is that a proviso in a statute refers only to the provision to which it is attached, and, as a general rule, a proviso is deemed to apply only to the immediate preceding clause or provision. It should be confined to what precedes, unless it is clear that it was intended to apply to subsequent matters."* (Emphasis supplied.)

In considering the various Kentucky Stautes governing issues in the case at bar it seems to us, the ~~appellant~~ respondent in this action, that there can be no question as to the intent of the Legislature in the enactment of KRS 91.480, Clause 3, in which the Legislature said in unequivocal terms as follows:

> *"The failure of the tax receiver to send or the taxpayer to receive the notice of sale required by Sub-Section 2 of this Section shall not invalidate the sale or any subsequent proceedings thereunder, and no levy or attempted levy upon personal property shall be necessary to validate any sale of real property, whether for taxes on real property, personal property or both."* (Emphasis supplied.)

We wish to call the Court's attention to a recent decision of the Court of Criminal Appeals of Texas in the case of *A. R. Sheffield* v. *The State of Texas*, 307 S. W. 2d page 100, in which the Court, in passing on the construction of a Statute said as follows:

> *"It is a rule of statutory construction that where two statutes cover the same subject matter, the one general and the other special, the special statute will control, not upon any theory of implied repeal, but upon the broad rule that all parts of the acts or statutes must stand if possible, and that the intention of the legislature is more clearly reflected by the special statute than by the general one. Both are permitted to stand, each applying in its proper place, the special statute being treated as though it were a proviso excepting something from the general one.* Fortinberry v. State, Tex. Com. App., 283 S. W. 146; Hunt v. Atkinson, Tex. Com. App.,

12 S. W. 2d 142, 17 S. W. 2d 780, City of Marshall v. State Bank of Marshall, 60 Tex. Civ. App. 508, 127 S. W. 1083, error refused. Ex parte Townsend, 64 Tex. Cr. R. 350, 144 S. W. 628." (Emphasis supplied.)

In support of the Texas case *supra*, we now call the Court's attention to a recent opinion of Court of Appeals of Kentucky in the case of *Bedinger* v. *Graybill's Executor and Trustee*, 302 S. W. 2d 594, in which this Court has said:

"We revert to our adoption statute. The courts are bound by statutory law as written and cannot write into it an exception which the legislature did not make. Mastin v. McLain, 204 Ky. 504, 264 S. W. 1069; Falls Barach Coal Company v. Proctor Coal Company, 203 Ky. 307, 262 S. W. 300, 37 A. L. R. 1172; Bank of St. Helen v. Mann's Executors, 226 Ky. 381, 11 S. W. 2d 144, 145. *However just and desirable it may sometimes be, the courts may not supply an omission and thereby give force and effect to a statute when applied to a subject about which nothing whatever is said, or when to all appearances it is a condition not in the minds of the legislature at all.* This, of course, is not the same as supplying words where necessary to obviate inconsistency or to complete the sense of a statute. Commonwealth v. Litiginski, 212 Ky. 366, 279 S. W. 339; Barker v. Sterns Coal and Lumber Co., 287 Ky. 340, 152 S. W. 2d 953. Nor may a statute be disregarded or amended for the purpose of preventing an evil consequence that may follow from the only interpretation of which it is susceptible. Thus the court could not hold

that a wife has forfeited her statutory rights as a widow by the fact that she had killed her husband. Eversole v. Eversole, 169 Ky. 793, 185 S. W. 487, L.R.A. 1916 E, 593. So the fact that the adoption statute as it is written opens the door to incongruous use is not reason why or authority for the court interposing an exception or qualification which the legislature did not put into it. It cannot be said, as the appellants contend it should be said, that the adoption for the sole purpose of making an heir is outside the scope of the law." (Emphasis supplied.)

While the foregoing opinion was written in the case *supra* where Robert E. Graybill sought to defeat a clause in his mother's Will which limited his interest in property to himself as long as he lived and then to his heirs, by adopting his wife as his heir, under the Kentucky adoption laws. The opinion of the Court in this case clearly holds that the only duty of the Court is to follow the Statute as written. In the case at bar the Statute is clear and simple and it is the duty of this Court to uphold the Statute unless, that, for some good and sufficient reason the Statute has been declared unconstitutional. None of the statutes referred to as KRS 91.010 *et seq.* has been declared unconstitutional by this Court, or any other Court. The opponents of the foregoing Statute in opposition to the enforcement of the tax laws have used the same argument as was used in the case *supra* by the opponents of the adoption laws which is as follows:

"It is argued by the appellants that the adoption of a wife is void as against public policy.

> Public policy is a vague and indefinite term and is incapable of accurate and precise definition. The public policy of a state is to be found in its constitution and statutes, and it is only in the absence of any expressed or implied declaration in instruments that it may be declared by judicial decisions. *If the legislature has spoken clearly and constitutionally, the courts may not substitute their own ideas of public policy. So what is clearly authorized by a statute cannot be nullified as being against public policy.* True, such policy retains a place in the process of statutory interpretation, and in case of doubtful legislative meaning disregard of such policy will not be attributed to the law making power. Sutherland, Statutory Construction; paragraph 5901, 5902; 50 Am. Jur., Statutes, paragraph 300; Kentucky State Fair Board v. Fowler, 310 Ky. 607, 221 S. W. 2d 425." (Emphasis supplied.)

The principle of law expressed in the foregoing case *supra* is exactly the same as in the case at bar. KRS 91.470 provides for the collection of taxes; that the tax receiver shall restrain the personal property of the taxpayer if any to be found owned or rightfully in the possessions of the taxpayer, to satisfy the taxes, but this section makes no direct provision for the collection of taxes on real property. It apparently referred to and was for the purpose of providing the means for the collection of personal property taxes. The record in this case clearly demonstrates the fact that the taxpayer not only did not have any personal property upon which the tax receiver might levy or distrain, but that he had never listed any personal property for tax pur-

pose as required by law. KRS 91.480 provides the procedure that the tax receiver shall pursue for the collection of taxes due and unpaid upon real property in the City of Louisville and that sub-section 3 of said Statute in no uncertain terms states that:

> "No levy or attempted levy upon personal property shall be necessary to validate any sale of real property whether for taxes on real property, personal property or both."

There can be no doubt in the minds of this Court about the intent of the Legislature in the enactment of this Statute.

We wish to call the Court's attention to a recent decision of the Supreme Court of Arkansas in which that Court was requested to cancel a deed obtained by reason of plaintiff's failure to pay taxes and assessments that had been made against his property.

> "Suit for cancellation of the deed from a drainage district and that plaintiff should be allowed to pay any taxes and assessments found delinquent. Judgment for the plaintiff in the Chancery Court, Miller County, James H. Pilkinton, Chancellor, and the defendant appealed. The Supreme Court, McFaddin, J., held that plaintiff was not entitled to void an improvement district foreclosure sale and effect redemption because not named in the published notice as owner of the land, where it was his own failure to comply with the statute, that prevented him from being listed as the owner." O. P. Leonard, Trustee v. Vance M. Thompson, 306 S. W. 2d 869.

This case is parallel in many respects to the case at bar. If the defendant, Ralph Richardson (now the petitioner), had any right at all he has forfeited same by his failure to list his property and never asserted any claim or interest until after the sale of the tax bill, the payment of taxes for two subsequent years and the issuance by the tax receiver of a deed to the purchaser and not even then until after suit was filed for possession of the property. In further discussing this matter in the case *supra* concerning the publication of notice to the taxpayer, the Supreme Court said:

> "Because the published notice in the foreclosure suit named the Dorsey Land and Lumber Company as the supposed owner, Thompson claimed in the present suit that the entire foreclosure suit of the Drainage District was void and that Thompson still had the right to redeem for the delinquent assessment of 1947, 1948, and subsequent years.
>
> "The Chancery Court agreed with Thompson's contention and allowed him the right of redemption, the effect of which was to require Leonard to receive certain funds and thereby have his title extinguished."

This is almost identical with the situation in the case at bar and it is the argument of appellant that the rule established in the Supreme Court of Arkansas is the natural and general rule of all the appellate courts in this jurisdiction.

The Supreme Court in its further opinion in this case *supra* says as follows:

"In this case the appellee testified he had no actual knowledge of the suit to foreclose, but that he knew the land was in the district and that the taxes had not been paid. We are, therefore, of the opinion that the statute above mentioned relating to the publication of the notice was substantially complied with and that Simpson v. Reiman, *supra, is not controlling here. Appellee's loss is due to his own negligence and he has no just complaint. His land was sold according to law.*" (Emphasis supplied.)

The petitioner, in the case at bar does not anywhere in this record claim that the assessment was void, or that any of the other provisions of the statute were not complied with. His only claim is that the deed is void *ab initio* because the tax receiver of the City of Louisville failed to levy or attempt to levy upon personal property of the taxpayer before sale of the real estate to pay the taxes assessed against him, although he had not listed for taxation any personal property, that would be reasonably available for restraint by the Tax Receiver. In order to satisfy the payment of petitioner's taxes for the years 1950, 1951 and 1952 and no doubt he would have claimed that so much of his personal property as being exempt if any had been found.

IMPORTANT DECISIONS.

We most earnestly call this Court's attention to the opinion rendered by the Court of Appeals of Kentucky some years ago in the case of *Drane* v. *Graves,* 261 Ky. 787, 88 S. W. 2d 927, in which this Court very carefully and fully construes KRS 91.470, 91.480, 91.490, 91.500, 91.510, 91.520, 91.530, and KRS 91.540. This was an action instituted in the Jefferson Circuit Court, Common Pleas Branch, Third Division, and involves all the questions now being adjudicated in this action and very particularly rested upon the validity of a tax deed, such as we have herein, and was continued in the courts for some period of time.

Meanwhile, during this litigation or before, this property had been sold for taxes and been bought by a man by the name of Faust. Proper report had been made of that sale and after the expiration of two (2) years, and no redemption having been made, the Tax Receiver of the City of Louisville, in accordance with the provision of the law, had conveyed the property to Faust, which occurred in 1930. Mrs. Drane, after filing her equity action, purchased this tax title of Faust and was the owner of it at the time she filed her answer in the action filed by Mrs. Graves to collect rent.

The issues having been made for both the plaintiff and defendant upon trial, the Court peremptorily instructed the jury to find for the plaintiff the total amount of rental collected by Mrs. Drane. From that judgment Mrs. Drane appealed. There were several questions involved in this action such as the right for

damages for trespass, ownership of the property under a tax deed and other matters relating to the right of Mrs. Graves to obtain damage against Mrs. Drane for trespass and the collection of rent, all of which were disposed of by the Court before taking up the question of the validity of a tax deed. The Court in this case has used some very strong and forcible language in its opinion rendered herein, which is as follows:

"We need not further comment (referring to the foregoing construction of the questions involved) on the error of the Court in so doing, and which leaves for consideration the only remaining question that we deem proper to refer to and discuss, and which is the effect of the Tax Receiver's deed executed to Faust in 1930 and his later conveying his claim to the defendant herein.

"It is conceded by plaintiff's counsel that a tax deed is not only presumptive evidence of regularity and complies with the applicable law, but also its effect, in sales of real estate in the collection of taxes due the Commonwealth and counties is to convey the taxpayer's title to the tax sale purchaser under the provision of Sec. 4154 of our present Statutes. Section 3004 which is a part of the Charter of the Cities of the First Class, to which the City of Louisville belongs, deals with the same question as applies to the sale of real estate in the collection of taxes due first class cities, and the relevant portion of it is: '*If the land be not redeemed within two years from the date of sale, a fee simple title shall rest absolutely in the purchaser, subject only to State taxes. Thereupon the Tax Receiver then in office shall convey the prop-*

erty by deed to the purchaser who shall then be entitled to the possessions of the property and have the right to recover same by suit or motion as may be found most appropriate; Provided it shall be the duty of the purchaser other than the City, to pay all later tax bills owing to the City, with interest, as provided in Section 2298 which were assessed against that property after the assessment of the tax for which it was sold, and the Tax Receiver shall not convey the property to such a purchaser until all such tax bills have been paid. Such deed shall be prima facie evidence of the regularity of the sale, and all prior proceedings and title in the person to whom the deed has been executed." (Emphasis supplied.)

Faust complied with all these provisions before he received a tax deed and therefore, under the Statute, was entitled to the possessions of the property.

"But counsel insist that a provision found in Section 3001 of the same Statute, and being a part of the same City Charter, qualified the effect of Section 3004 so as to give the tax purchaser after obtaining his tax deed only a lien upon the property purchased by him when there are other prior liens against it of record and that contention is based on this excerpt from Section 3001—'Except that where there are bona fide mortgages or vendor's lien of record on real estate, only liens now given by law shall be enforced by such sale.' It is contended by plaintiff's counsel that the excerpts so made from that section has the effect of merely subrogating the purchaser to the right of the City and gives him only a lien upon the property.

Clearly, the Legislature did not intend to repeal in toto Section 3004 by the adoption of that excerpt as a part of 3001, and the connection in which it is employed clearly indicates that no such purpose was entertained. On the contrary, the excerpt was really surplusage, since the sale of property for the purpose of enforcing tax liens was never regarded as a proper proceeding for the enforcement of prior contractual liens upon the same property, and the purchaser at the sale of the property so encumbered took it subject to the lien of such encumbrance, but with a prior lien for the amount he had paid with interest, penalties, etc. So far, *however, as the owners of the property were concerned, even in that case (and without exception) the later title would be conveyed and the excerpt was but an expressed incorporation in the Statute of that prior universally applied principle of law. The framers of the Statute evidently wanted it distinctly understood that such prior existing liens could and would not be enforced in the proceedings provided for the sale of property for taxes."* (Emphasis supplied.)

The foregoing language of the Court should be and is certainly strong enough to contradict the contention of the petitioner that this deed to C. C. Brunner is void, *ab initio.*

FEDERAL QUESTIONS SOUGHT TO BE REVIEWED.

The petitioner sets out in his petition from pages 15 to 33 inclusive the questions which he seeks to have reviewed. It seems that he is premature in seeking a review of the questions therein as he has not exhausted his rights under the state laws, through the various State Courts of the state.

If this Statute is arbitrary or repugnant to the Constitution the test should be made under the State laws, before the Supreme Court should be called upon to rule upon a question that has not been tried in the State Courts.

KRS 411.120—ACTION TO QUIET TITLE.

Petitioner recites the foregoing section of the Kentucky Revised Statutes as one of his grounds to invoke the jurisdiction of this Court, but it is contended by respondent that section has no effect whatever upon the matters involved in this action, the entire law governing levying and collection of taxes in Cities of the First Class is found in KRS 91.010 *et seq.*, and the City ordinances in accordance therefo.

"The mere assertion in a State Court of a Federal right in a petition for rehearing affords no grounds for invoking the jurisdiction of the Supreme Court unless the Court below in dealing with the petition considers and passes upon the Federal grounds relied upon. Rowe v. Scott, 233 U. S. 658, 58 L. Ed. 1141.

CONSTITUTIONAL PROVISIONS NOT INVOLVED.

Respondent relies unconditionally upon the record in this cause for his defense herein and cites the opinion of the Court of Appeals in upholding the decisions of the trial Court and the statutes.

The only real question before the Court at this time is whether or not the default judgment rendered herein is a valid judgment under the law of the state of Kentucky, the same having been upheld 3 times by the highest Court of the State, the Court of Appeals of Kentucky, see Richardson v. Brunner, 327 S. W. 2d 572, and Richardson v. Brunner, 328 S. W. 2d 530.

This seems to be sufficient to clearly establish the validity of the judgment herein.

IN CONCLUSION.

The respondent having fully answered petitioner's petition herein, prays this Honorable Court that the Writ of Certiorari to the Court of Appeals of Kentucky be denied, and that petitioner's petition be dismissed.

C. L. Bell,
Attorney for Respondent,
C. C. Brunner.